**PP**

**v.**

**TEH LEONG ENG**

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[CRIMINAL TRIAL NO: MT(6) 45A-21-2009]
13 JULY 2010

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Trafficking in dangerous drugs - Accused faced with five charges of trafficking - Whether possession, custody or control established - Whether knowledge sufficient to establish possession*

***CRIMINAL PROCEDURE:*** *Disclosure of information - Statement of accused - Whether statement admissible as evidence - Whether requirement for admissibility of statement fulfilled - Whether admissible - Criminal Procedure Code, s. 113*

***CRIMINAL PROCEDURE:*** *Exhibits - Break in chain of evidence - Failure to produce exhibit - Whether exhibit directly related to issue to be proved - Whether going to identity of vital evidence*

The accused was arrested following a raid conducted by two police parties and upon arrest alleged to have admitted to SP4 (raiding officer) that he kept drugs in another place. SP4 subsequently read a caution in the Hokkien dialect through an assistant. The accused then handed over a set of keys to SP4 and led the raiding team to the premises where a large quantity of drugs was discovered. The accused was then charged for five charges of trafficking under s. 39B(1) of the Dangerous Drugs Act 1952 (DDA). The issues to be considered by the court were, *inter alia*: (i) whether the accused had custody or control of the drugs specified in the charges against him and whether there was direct evidence of possession; (ii) whether the statements made by the accused to SP4 after the arrest were admissible as evidence under s. 113 of the Criminal Procedure Code (CPC), s. 37A of the DDA or alternatively under s. 27 of the Evidence Act 1950; (iii) whether the evidence of SP4 and SP5 that the accused had in his possession at the material time the keys to the room of discovery and handed them over to SP4 was credible and believable; and (iv) whether there was serious doubt as to the identity of the drug exhibits.

**Held (*prima facie* case not established):**

**(1)** In the instant case, it was not shown that any person or persons other than the accused did not have access to the room in question. The sum total of the evidence against the accused was the knowledge of storage of various drugs in the room and that he had the keys to gain entry into it. Nothing was found in the room to indicate that he had occupied it. Even though knowledge is a prerequisite of possession, knowledge alone without the pre-requisite proof of custody or control is however, insufficient to establish possession. (para 11)

**(2)** Mere administering of caution is insufficient to render as admissible the statement of an accused placed under arrest. It was essential to establish voluntariness on the part of the accused and that he was not under any threat, inducement or promise which SP4 had failed to ensure. Hence, it was plain and clear that the said statements, which were also not reduced into any form of writing and were merely uttered from SP4's recollection, were clearly inadmissible in law. (para 17)

**(3)** In the instant case, there being material differences in the evidence as regards the information allegedly given by the accused, together with the absence of any evidence on what transpired during the three hours preceding the interrogation of the accused and the non-existence of any contemporaneous record, the stringent conditions for admission under s. 27 were clearly not strictly adhered to. Hence the said information evidence should rightly be rejected and disregarded. (para 21)

**(4)** The credibility of the evidence that the accused had the possession of the keys to the room was crucial as the evidence related directly to the issue of custody and control of the drugs exhibits. The failure by the prosecution to produce the set of keys or the padlocks, which were the items on the search list as having been recovered from the accused, for positive identification resulted in a gap and break in the chain of evidence in the prosecution's case going to the identity of vital evidence. This, in law, would mean that a *prima facie* case had not been made out. (paras 22 & 23)

**(5)** Further, in view of the failure to satisfactorily deal with the deficiencies as to the identity of the exhibit a gap had arisen in the prosecution's case and it had not been bridged. In the circumstances a *prima facie* case had not been made out as it involved the identity of the very subject matter of the charges levelled against the accused. (para 27)

**Case(s) referred to:**
*Balachandran v. PP [2005] 1 CLJ 85 FC* ***(refd)***
*Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC* ***(refd)***
*Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC* ***(refd)***
*Hasamuddin Talena v. PP [2002] 2 CLJ 504 CA* ***(refd)***
*Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC* ***(refd)***
*Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(refd)***
*PP v. Mohd Al-Afizi Ithnin [2009] 7 CLJ 80 HC* ***(refd)***
*PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 HC* ***(refd)***
*Roslan Abdullah v. PP [2010] 1 CLJ 685 CA* ***(refd)***
*Su Ah Ping v. PP [1979] 1 LNS 100 FC* ***(refd)***
*Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 113
Dangerous Drugs Act 1952, ss. 37A(1), (da), 39B(1), (2)
Evidence Act 1950, ss. 27, 114(g)

*For the accused - KL Chee; M/s KL Chee & Co*
*For the prosecution - Mohd Amril Johari (Fadzaly Ali DPP with him); State Legal Advisor*

*Reported by S Barathi*

## JUDGMENT

**Gunalan Muniandy JC:**

**[1]** The accused faces five charges, each for an offence of trafficking in certain types of dangerous drugs under s. 39B(1) of the Dangerous Drugs Act 1952 ('DDA') punishable under s. 39(B)(2) of the same Act.

**Facts**

**[2]** The events leading to the discovery of the dangerous drugs ("the drug exhibits") began with a raid conducted by a police raiding party led by one ASP Suhud at a premise bearing address No. 16 Jalan Permas 8/3, Permas Jaya ("house No. 16") at about 5.30am on the day in question. Another raiding party led by the raiding officer in this case (SP4) stood guard outside house No. 16 for almost four hours. At about 9.30am, upon instructions through the handphone from ASP Suhud, SP4 entered house No. 16 and met the accused who had then been arrested and handcuffed. At this point during their discussion, the accused is said to have admitted to SP4 that he had kept drugs in another place. SP4 responded by reading the caution to the accused in the Hokkien dialect through the assistance of a Chinese male officer,

A under s. 37A(l), ADB 1952. Upon the accused's admission that he understood the caution, SP4 questioned him further whereupon the accused revealed that the drugs were kept in a store in Taman Pelangi, Johor Bahru ('house No. 3') and that the drugs comprised "Syabu, Eramin 5, Ketamine, Heroin Base and Ecstacy pills". On being asked B whether the accused could lead him to the premises, the accused said 'yes' and handed over a set of keys to him.

**[3]** On reaching house no. 3, SP4 himself opened the front metal gate padlock using the said set of keys and entered the house through the front main door together with the raiding team led by him with the C assistance of one ASP Abd. Halim (SP5). On reaching upstairs, they found a male and two female Chinese occupying a room. They were arrested as suspects in this case. Another room was found to be locked and said to be rented out to a Singaporean who was not present. The accused then led SP4 to a small room downstairs which SP4 opened D again using the same set of keys. On inspection, a large quantity of drugs was discovered packaged as follows:

(i) A box containing a green plastic packet used to keep 232 rubber-band bunches, each bunch containing 25 pieces of aluminium foil wrapping 10 tablets believed to be "Eramin 5" per foil found on E the floor;

(ii) A clothing bag also lying on the floor in which was found 45 packages of white pieces wrapped in wax paper and colourless plastic believed to be heroin;

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(iii) 26 newspaper packages containing 100 pieces of aluminium foil each used to wrap 10 tablets believed to be Eramin 5 found in an 'almari' drawer;

(iv) 17 newspaper packages containing 100 pieces of aluminium foil G each used to wrap 10 tablets found in an 'almari' rack used to hang clothing;

(v) Five newspaper packages containing two white compact pieces wrapped in newspaper, plastic and cellotape suspected to be heroin H found on the bottom rack of a cupboard;

(vi) Four newspaper packages each containing plastic packet filled with whitish powder suspected to be Ketamine also found on the bottom rack of a cupboard;

I (vii) 14 newspaper packages containing double layer plastic packets filled with pieces of powder crystals suspected to be Syabu found on the middle rack of the same cupboard;

(viii) One aluminium foil containing five plastic packets filled with yellow coloured pills suspected to be "Ecstacy' found on the top rack of the same cupboard;

(ix) One plastic container containing two plastic packets filled with blue coloured pills suspected to be Ecstacy also found on the top rack of the cupboard;

(x) One black paper package wrapped with sponge and colourless plastic containing a double-layer plastic packet filled with whitish powder suspected to be drugs found on top of the same cupboard.

**[4]** An "Impulse Sealer Model PFS-200" was also recovered from the room.

**[5]** All the drug exhibits were analysed by the Government Chemist (SP6) and found to contain the various quantities of dangerous drugs as per the five charges.

**[6]** The role of SP5 was to assist SP4 during the raid and to ensure safe custody of the exhibits seized from the scene of incident to the Police Contingent ('IPK') before handing over to the Investigating Officer (I.O). SP5 also assisted in counting and storing the numerous exhibits but played no role in marking the drug exhibits which was done entirely by SP4.

**[7] Issues Arising**

(a) Whether the accused had in his custody or control, anything whatsoever containing the dangerous drugs discovered in this case as specified in the five charges? Alternatively, in view of the large quantity of various kinds of drugs being found in a locked room, whether there was direct evidence of possession by the accused?;

(b) Whether the statements made by the accused to SP4 after arrest were admissible as evidence under s. 113 of the Criminal Procedure Code ('CPC') s. 37A, DDA or alternatively, under s. 27 of the Evidence Act 1950?;

(c) Whether the evidence of SP4 and SP5 that the accused had in his possession at the material time the keys to the room of discovery and handed them over to SP4 was credible and believable?;

(d) Whether there was serious doubt as to the identity of the drug exhibits?

*Issue (a)*

**[8]** The prosecution's case relating to proof of the first and foremost ingredient of the five charges, ie, possession of the drugs, depends on the applicability of the presumption under s. 37(d) of DDA. This is so as there was a total absence of primary facts from which a finding of actual possession could be made for recourse to s. 37(da), DDA. In order to attract this presumption, it is imperative for proof of custody or control by the accused of the packages in which the drugs were found. Accepting the evidence of SP4 and SP5 at its face value that the accused had in his possession the keys to the front gate of the house and the room of discovery, did this *'ipso facto'* constitute custody or control over the said packages? There was no evidence that the accused was the occupier of this room as, *inter alia*, no personal belongings of his were found therein and he was found to be staying in house No. 16, ie, the first premises that was raided. House No. 3 had several occupants in two rooms upstairs whereas this room was downstairs. In the circumstances, was it safe to conclude that, apart from the accused's knowledge of the place where the packages of drugs were kept, the accused exclusively and no one else had access to the room?

**[9]** In this case, the accused did not have actual physical custody of the drugs at the material time. Could he, nevertheless, be said to have been in possession of the same? In *PP v. Mohd Al-Afizi Ithnin* [2009] 7 CLJ 80 at p. 87, Jeffrey Tan, J had this to say about the word "possession":

> There is no statutory definition of 'possession', a word said to be enigmatic and vague. However, judicial pronouncements on its meaning include invariably some degree of custody or control, and knowledge of the custody or control (see *Toh Ah Loh & Mak Tin v. Rex* [1948] 1 LNS 72; *Ho Seng Seng v. Rex* [1951] 1 LNS 25; *Leow Nghee Lim v. Brooks* [1974] AC 862; *PP v. Lai Ah Bee* [1974] 1 LNS 119; *Badrulsham bin Baharom v. PP* [1988] 2 MLJ 585) but 'a man has no possession of that of the existence of which he is unaware' (per Cave J in *R v. Ashwell* [1885] 16 QBD 190 at p. 201; see also *Saad Ibrahim v. PP* [1967] 1 LNS 154). "Mere knowledge however is not sufficient to establish possession" (see *Gooi Loo Seng v. PP* [1993] 3 CLJ 1), but the power of disposal (see *PP v. Kau Joo Huat* [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258). In Leow Nghee Lim, Taylor, J explained the meaning of custody "as having care or guardianship … knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession", while Ambrose J in *Neo Koon Cheo v. Regina* [1959] 1 LNS 64 explained that "custody is actual physical control".

**[10]** In the absence of physical custody of the packages of drugs in the instant case, some form of control had to be established over them. It is in this context that the access by others to the room has to be considered. The fact that the accused had access to the room and knew about the packages containing drugs kept there did not by itself mean that he had control over whatsoever found in the room if there was a possibility of access by other persons too. Circumstances such as the accused not being an occupier of the room or a tenant in the premises and the presence of several other persons in the premises point to the probability of other persons having had access to the room. Such access can only be excluded through evidence from relevant witnesses such as the other occupiers or tenants and particularly the owner. As it was not known in what capacity the said keys were in the accused's custody, such evidence was crucial and failure to produce it without explanation could result in an adverse inference being drawn under s. 114(g), Evidence Act 1950.

**[11]** It is trite law that whether a person can be said to be in custody or control of a thing is a question of fact to be decided from the particular facts and circumstances of each case and in this regard, no two cases are likely to have the same set of facts. In the instant case, as it was not shown that any person or persons other than the accused did not have access to the room in question, the accused could not, logically speaking, be said to have had control of the things in the room. (See *PP v. Muhamad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408). At its height, the evidence showed that the accused had knowledge that the various types of drugs were stored in the room to which he had access. It is well settled that mere knowledge of the existence of a thing did not amount to custody or control of that thing. The sum total of the evidence against the accused was the said knowledge of storage and that he had the keys to gain entry into the place of storage. Nothing was found in the room to indicate that he had occupied it. Even though knowledge is a pre-requisite of possession, knowledge alone without the pre-requisite proof of custody or control is however, insufficient to establish possession. (*Gooi Loo Seng v. PP* [1993] 3 CLJ 1). In *Gooi Looi Seng v. PP* [1993] it was held:

> We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

**[12]** Coming now to the evidence adduced, the prosecution failed to produce as witnesses, the three persons – two males and one female – arrested as suspects at the scene after being found in an upstairs room. These persons were occupiers of the premises at the most crucial point in time together with a couple said to be occupying the living room downstairs which was beside the room where the drugs were found. Photograph exh. P14(f) clearly showed that the living room had occupants at that time, which was confirmed by SP4, SP5 and SP9 as well as other tenants (SP8 and SP9) who were not present when the raid took place.

**[13]** These occupants and the suspects could certainly have thrown light on who actually occupied or used the room in question, particularly whether the accused did so, and the persons, if any, who had access to the room.

**[14]** The owner of the premises (SP7) could do no better than to produce the Tenancy Agreement (exh. P24) showing the tenants' names but he did not know who they were as he had not met any of them. The accused was not one of them. Out of the three tenants, only two were called as witnesses (SP8 and SP9). Defence counsel submitted that as SP7 had not been asked of his knowledge of the drug exhibits discovered in the premises belonging to him nor shown photographs of them, this by itself raised a doubt.

**[15]** SP8 could not recall who rented the said room downstairs and could not positively identify the person whom he had seen entering the room as it had already been two to three years since then. SP9, on the other hand, was certain that the room had been rented out to a male Chinese by the name of "Sotong" who was not to be seen in court. This meant that the room had indeed an occupier who was seen by SP8 occasionally entering but that person was not the accused. This piece of evidence by itself appeared to completely demolish the prosecution's case that the accused had exclusive access to and occupation of the room and thus, control over the things found therein. Neither was there evidence as to who this "Sotong" was or whether the matter was investigated. Even if SP9 could have been mistaken about his identity, SP9's physical description of this person did not match the appearance of the accused. The evidence of SP8, therefore, had the effect of exculpating the accused from the allegation of being in exclusive occupation of the place where the drugs were discovered.

**[16]** It was, thus, amply clear that far from throwing any light on the use and occupancy of the room of incident, witnesses who were called for this purpose were unable to say with any degree of certainty who the person or persons concerned were who used the room. More

importantly, none of them identified the accused as having used or ever entered the room though they were all tenants at the house at the material time.

*Issue (b) – Admissibility Of The Statements By Accused*

**[17]** It was admitted by SP4 that at the time the accused allegedly spoke to him at house No. 16, the accused had already been arrested. SP4 had entered this house at only about 9.30am, some four hours after the entry by another raiding team at about 5.30am led by one ASP Suhud who was not called as a witness. It was ASP Suhud who gave instructions to SP4 to enter but in view of the absence of ASP Suhud, it is not known what actually transpired at this premises before handing over of the said set of keys without being asked. At this point, the accused had all along been detained after arrest and as such, the statements allegedly made by the accused to SP4 during the conversation that ensued were inadmissible by s. 37A of the DDA unless the conditions under s. 113 of the CPC had been fulfilled. SP4 could not recollect the exact words of the caution that was allegedly administered to the accused other than to insist that it was in accordance with s. 113, CPC. In any event, it is trite law that mere administering of the said caution is insufficient to render as admissible the statement of an accused placed under arrest. It was essential to establish voluntariness on the part of the accused and that he was not under any threat, inducement or promise. This, SP4 obviously failed to ensure. Hence, it was plain and clear that the said statements, which were also not reduced into any form of writing and were merely uttered from SP4's recollection, were clearly inadmissible in law.

**[18]** Coming now to statements allegedly made by the accused leading to the discovery of the drug exhibits, s. 27 of the Evidence Act 1950 provides that only so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. Based on s. 27, I only considered the accused's statement that there was a store in house No. 3, Taman Pelangi and answers given by him to certain questions then asked by SP4 as follows:

Q: Di mana stor itu?

A: Di kawasan Taman Pelangi.

Q: Bolehkah awak tunjukkan kepada saya?

A: Boleh?

Together with the last answer, the accused allegedly handed over to SP4 the set of five keys before guiding him to house No. 3 and the room of discovery. I disallowed a further question by SP4 enquiring about the kinds of drugs kept in the store as the information sought was clearly outside the scope of s. 27. SP4 stated further that the above words uttered by OKT and not the exact words spoken by OKT.

**[19]** Defence counsel objected to any statement under s. 27 being admitted on several grounds. Firstly, that he had been under threat and oppression when making the statement as he had already been under arrest for about three hours then, before being interrogated by SP4 and thus, the admission would be prejudicial to him, secondly, there was no contemporaneous record of the exact statement made or information given by the accused as the record is only to be found in SP4's police report (exh. P18) lodged only some eight hours later without any reasonable explanation for the delay. Thirdly, that the words allegedly uttered by OKT differ materially between SP14's testimony and as spelt out in exh. P18. The accuseds perusal of these two sets of evidence would reveal the differences clearly. It was understandable for SP4 not to recollect the exact words used by OKT but it was not acceptable for him not to have promptly made a clear record of the exact words and the questions that he had asked as this was a most crucial piece of evidence having far-reaching implications against an accused person. The importance of such a record and the need for consistency and accuracy have been stressed by several authorities as pre-requisites for the admission of evidence under s. 27. Evidence Act 1950. To emphasize the point, I can do no better than to quote the following passage from the Court of Appeal case of *Hasamuddin Talena v. PP* [2002] 2 CLJ 504 where Gopal Sri Ram, JCA (as he then was) said:

> (1) The exact words of the statement allegedly made by the appellant during interrogation and at the place where the drugs were discovered respectively were not reduced into writing as soon as it was practicable to do so. In respect of the first statement, there was no excuse for the interrogator's failure to take down the questions put to and the responses received from the appellant either during the interrogation or immediately thereafter. In respect of the second statement, the interrogator should have put it down in writing in his diary as soon as he returned from the scene of the crime. The appellant's conviction, which rested squarely on these two statements, were therefore wholly unsafe.
>
> (2) Where the prosecution seeks to rely on information under the inclusionary provisions of s. 27 of the Evidence Act, approximations are not permitted. The exact words spoken by the accused have to be strictly proved. There should also be no paraphrasing. No judge

should allow one word or more to be deposed by the police than it is absolutely necessary to show how the fact discovered is connected with the accused.

**[20]** It is also trite law that for information evidence to be admitted under s. 27, Evidence Act 1950, it is subject to the "stringent conditions of admission" therein. Where there is uncertainty as to the actual words or contradictory versions and there is unreasonable delay in proper recording of the information, that part of the information that amounts to a confession is regarded as "eminently prejudicial". It could thus be rejected in the absence of a contemporaneous record of the alleged statements (See *Roslan Abdullah v. PP* [2010] 1 CLJ 685, per Jeffrey Tan, JCA).

**[21]** In the instant case, there being material differences in the evidence as regards the information allegedly given by the accused, together with the absence of any evidence on what transpired during the three hours preceding the interrogation of the accused and the non-existence of any contemporaneous record, the stringent conditions for admission under s. 27 were clearly not strictly adhered to. Hence, the said information evidence should rightly be rejected and disregarded.

*Issue (c) – Credibility Of The Evidence That The Accused Had Possession Of The Keys To The Room*

**[22]** This, in my view, is a crucial issue under the circumstances of this case as the evidence in question relates directly to the issue of custody or control of the drug exhibits. Both SP4 and SP5 testified categorically that the accused had personally taken the keys from somewhere and handed them over to SP4. The keys were then used by SP4 to open the padlocks attached to the front gate and the door of the room where the drugs were discovered. The defence strenuously challenged this evidence by alleging that the set of keys was never obtained from the accused but was recovered by the raiding party themselves from the floor of the living room of house No. 3 and that the room door had been forced open. Most unfortunately, neither the set of keys nor the padlocks, which were items on the Search List as having been recovered from the accused, was produced in court for positive identification. By the same token, the accused was denied the opportunity to raise any defences or denials pertaining to the identity of these vital exhibits which provided the sole nexus or linkage between the accused and the room. The only explanation forthcoming from the I.O (SP10) for the said non-production was that the exhibits were lost or misplaced, without more. Surely, to accept a one-word explanation for failure to produce vital exhibits as sufficient would be unthinkable. Most importantly, it was incumbent for the prosecution to prove to the court's satisfaction that the set of keys recovered from the accused could in fact

be used to open the two padlocks. Merely identifying the padlocks and keys from police photographs, which did not clearly show the markings by SP4 or SP10 (I.O – Investigating Officer), was far from satisfactory for the purposes of positive identification. Making an adverse inference under s. 114(g), Evidence Act 1950 for this unexplained failure was unavoidable.

**[23]** The failure to produce the above exhibit had, in my view, resulted in nothing less than a gap and a break in the chain of evidence in the prosecution's case going to the identity of vital exhibits. It is well settled that this, in law, would mean that a *prima facie* case had not been made out. It is all the more so in the instant case as the defence challenged the version that the keys had been recovered from the accused and suggested that they had been found elsewhere and had no connection with the accused. This was compounded by grave doubts as to where the accused had obtained the keys from, as a result of contradictions in the evidence of SP4 and SP5. He could not have kept them in his person as he must have been thoroughly searched during the four hours of investigation by ASP Sohod's team. Neither could he have taken them out from any other place such as a cupboard as alleged by SP5 as his hands had been handcuffed to the back. (See *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168). In *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386, it was held:

> In so far as the trial court is concerned,its duty is essentially to decide whether on the evidence before it, the prosecution has proved its case. Where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case, there was such a failure.

*Issue (d) – Identity Of The Drug Exhibits*

**[24]** There is no doubt that this case involves an enormous quantity of drugs seized. Hence, in the process of marking of the various packages, handing them over to and receiving them back from the Chemistry Department, and eventually tendering the essential exhibits at the trial there was bound to be errors or omissions in the marking. Be that as it may, this does not absolve the prosecution from the onus of establishing positively, as in every criminal trial, the identity of the incriminating exhibits and providing an explanation for any slip-up or errors. While there is no need to call every officer to establish the chain of evidence, it is trite law that a police officer who seizes any object at the scene of crime and intends to produce it in court later as an exhibit must have it properly marked for identification. In the event doubt arises

as to identity, an explanation is required by calling the necessary witnesses (*Su Ah Ping v. PP* [1979] 1 LNS 100 FC). The principle regarding the chain of evidence in drug trafficking cases was spelt out clearly in *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857 as follows:

> I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc., and it is for the trafficking of that same substance that the accused is charged with.

**[25]** In the present case, the defence mounted a two-fold challenge against the identity of the drug exhibits tendered: firstly, that the mix-up, errors and omissions in marking led to confusion; and secondly, that the exhibits belonged to a different case as they bore a report number that differed from the arrest report in this case. On the first ground, the problem arose due to different markings made by the raiding officer (SP4) and the I.O (SP10) on the packages and boxes, the first using a red marker pen and the second a black one. SP10, however, only marked some of the exhibits, leaving out a huge number of pills. SP4 admitted not recording 29 small plastic packets (exh. P9B(7a-7d)] in both the search list and his police report. No markings were done by him on these packets due to inadvertence ('tak perasaan'). The chemist (SP6) did not find a certain marking made by SP4 and did not include it in her report. Only on recall did she explain that this was a typographical error, which, as argued, was doubtful. The learned Deputy Public Prosecutor submitted that as all the exhibits seized by SP4 as per the Search List (exh. P16) had been duly identified by SP6 and SP10 as being the exhibits received by them and of the same quantity, these were mere irregularities. In view of the immense quantity of drugs involved and the fact that all the drug exhibits, which matched the quantity and types seized, had been duly identified as aforesaid and produced in court. I did not consider that the said flaws and omissions by themselves raised any serious doubt as to the identity of the exhibits. However, the same could not be said of the contradiction in the police report number as discussed below.

**[26]** SP1, the storekeeper testified that he had in this case received for safekeeping exhibits pertaining to Taman Pelangi Report No. 938/08 from SP10 (I.O) and had so recorded in the Exhibits Register Book (exh. P4). The request form to the Chemistry Department prepared by SP10 ('POL. 31') states the same report no. ('938/08') as does the acknowledgment receipt issued by SP6. Same goes for the chemist report prepared and issued by SP6 (exh. P20). However, both the Search List (exh. P16) and the Exhibits Handing-Over Form (exh. P17) state the report number to be "Aduan No. 983/08". The photographs (exh. P15a – P15m) also state that they relate to this report number ('983/08'). The boxes used to store the drug exhibits all bear the original report no. '938/08'. There was no explanation provided by any of the witnesses concerned who were not called for clarification with the exception of SP10 who merely said that he had made an error in that this investigation was carried out in respect of 'Taman Pelangi Report No. 983/08' as correctly stated in exh. P16 and exh. P17. A single error in marking may be acceptable but as it extended to so many crucial exhibits, a one word explanation would not be justifiable for the serious discrepancy that concerned the identity of the most important exhibits in this case. An inference that these exhibits were in respect of another case could not be completely ruled out.

**[27]** In view of the above deficiencies which were not satisfactorily dealt with to overcome any doubt as to the identity of the exhibits, I upheld the defence submission that resulting effectively from the doubt in marking of the exhibits by SP4, the failure of SP10 to mark a portion of the exhibits, and the serious discrepancy as to the report number, a gap had arisen in the prosecution's case. This gap in the chain of evidence had not been bridged. Such a situation would mean that a *prima facie* case had not been made out as it involved the identity of the very subject matter of the charges levelled against the accused. In *Lee Chan Meng v. PP (supra)*, it was held, *inter alia*, that:

> Where there is a serious doubt as to identity of the exhibit as clearly is the case here it cannot be said that the prosecution has established a *prima facie* case under the charge.

**Finding**

**[28]** It has been well-established that the current position as regards the proof of a *prima facie* case is that each and every ingredient of the offence charged must be proved through sufficient and credible evidence subjected to a maximum evaluation such that it would warrant a conviction if the accused choses to remain silent upon his defence being called. (See *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; *Balachandran v. PP* [2005] 1 CLJ 85).

**[29]** In the instant case, all five charges are for trafficking in dangerous drugs. In this respect, the common vital ingredient of all the charges is possession of the said drugs, proof of which could be by direct evidence to invoke the presumption of trafficking under s. 37(da) or through proof of custody or control for recourse to the presumption under s. 37(d) of the DDA, 1950. Based on my analysis of the evidence as above and the possible inferences that could be drawn as adverted to, my conclusion is that the evidence viewed from all angles clearly failed to establish possession, custody or control by the accused of any of the various items of the dangerous drugs set out in the charges. I, thus, found that a *prima facie* case had not been made out against him in respect of any of the charges.

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